91-73

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KENNETH W. DAVIS, JR., ET AL

Petitioners,
(Plaintiffs-Appellants)

VERSUS

MORGAN GUARANTY TRUST CO., ET AL

Respondents.
(Defendants-Appellees)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether federal law determines standing under RICO or whether state common law principles of standing can be used to deny Petitioners standing under RICO, when the effect of interposing state law frustrates a comprehensive federal regulatory scheme dependent upon private attorneys general to assist in civil prosecutions, and subjects RICO to inconsistent interpretation and enforcement by virtue of the application of non-uniform state law?

2. Whether the use by the United States Court of Appeals for the Fifth Circuit of "non-RICO" standing requirements conflicts with the decisions of other United States Courts of Appeals?

3. If state law standing principles would otherwise bar a claim because the

claimant is only indirectly injured, does RICO allow an indirectly injured person to prosecute a RICO claim when the directly injured person is under the control of the wrongdoer?

4. What are the parameters of the "by reason of" causation language contained within RICO: cause in fact, proximate cause, or something else?

PARTIES TO THE PROCEEDING

PETITIONERS
(Plaintiffs-Appellants)

KENNETH W. DAVIS, JR.

ALANA DAVIS MARSH, Individually and as Next Friend and Custodian for TRICIA KAY LAWLER, a Minor

ALAN TUCKER DAVIS, Individually and as Next Friend and Custodian for ALAN KENNETH DAVIS and JENIECE BREANNE DAVIS, Minors

KAY DAVIS, Individually and as Trustee

T.C. DAVIS, II

BRIAN KEITH DAVIS

TREY DAVIS

KAREN DAVIS, as Next Friend and Custodian for CHELSEY DAVIS

GREAT WESTERN MARKETING CO. *

GREAT WESTERN DRILLING CO. *

KENDAVIS FINANCE CO., a division of GREAT WESTERN DRILLING CO. *

* No parent or wholly owned subsidiary companies.

RESPONDENTS
(Defendants-Appellees)

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

BANK OF NOVA SCOTIA

BANK OF NEW YORK

SECURITY PACIFIC NATIONAL BANK

IRVING TRUST COMPANY

CREDIT COMMERCIAL DE FRANCE

MARINE MIDLAND BANK

AMERICAN BANK & TRUST COMPANY OF NEW ORLEANS

FIRST CITY NATIONAL BANK -- HOUSTON

BANK OF OKLAHOMA -- TULSA

FIRST INTERSTATE BANK OF CALIFORNIA

SANWA BANK CALIFORNIA (SUCCESSOR TO LLOYDS BANK OF CALIFORNIA)

FIRST CITY NATIONAL BANK FORT WORTH

SEATTLE FIRST NATIONAL BANK

THE CHASE MANHATTAN BANK N.A.

JOHN PAYNE

DONALD J. ROBINSON

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1. The United States Court of Appeals for the Fifth Circuit erred in using state common law notions of standing and direct versus indirect injury as the basis to dismiss the RICO claims of Petitioners, because RICO has its own standing requirement. The application of state law standing concepts completely frustrates the regulatory scheme

envisioned in RICO, undermines its consistent interpretation and enforcement, and permits racketeers to escape civil prosecution. Certiorari should be granted to decide if state common law or federal law determines matters of RICO standing..... 23

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STATEMENT OF JURISDICTION

On April 8, 1991, the United States Court of Appeals for the Fifth Circuit entered its order affirming the Rule 12(b)(6) dismissal of Petitioners' suit by the District Court for the Northern District of Texas. (Appendix p. 1a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTE INVOLVED

The pertinent portions of the following statutes are involved in the disposition of this case.

18 U.S.C. §1961 (3):

> "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

18 U.S.C. §1964 (c):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This appeal involves a Rule 12(b)(6) dismissal of claims brought pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 et seq. In affirming the dismissal, the Fifth Circuit Court of Appeals ruled that a RICO plaintiff must first meet state law standing requirements in order to state a cognizable RICO claim. No such language or limitation appears in the RICO statute. In addition, the Fifth Circuit ruled that RICO's causation language -- "by reason of" -- means something more than foreseeable injury. That interpretation conflicts with the remedial purposes of RICO and this Court's rulings regarding the broad scope of the statute.

I. The Parties to the Appeal Below

Petitioners comprise two separate sets of claimants: a group of individuals

referred to as the Davis Family, and three corporations referred to as the Corporate Plaintiffs. The events which formed the basis of the underlying suit involve transactions between companies in which the Davis Family had an ownership interest and their lenders.

The Davis Family members are former shareholders of Kendavis Holding Company ("KHC"), a diversified company whose holdings in 1987 included a group of more than 80 corporations and business divisions known as the Kendavis Industries Companies (the "KICs"). Since the founding of the original Kendavis Companies in 1930 by Ken W. Davis, Sr., the KICs experienced an impressive period of growth and diversification. Their credit rating and banking relationships were respected and considered among the best in the corporate world. The KICs

borrowed money from banking institutions throughout the world at or below the most favored prime lending rates for corporations, and credit was always extended on an unsecured basis. Moreover, no KIC had ever failed to meet any negotiated financial obligation. As of year end 1983, approximately the time the fraudulent schemes made the basis of the suit began to be implemented, the KICs had a net worth of approximately $330,000,000.00, annual sales averaging in excess of one and one-half billion dollars per year, and over 16,000 persons in their employ.

One of the KICs, Kendavis Industries International, Inc. ("KIII") provided management and corporate support services to all of the KICs. Generally, KIII was also the formal borrower for the KICs on

the bank debt that forms an integral part of this suit.

Three members of the Davis Family -- Kenneth W. Davis, Jr., Kay Davis and A. Tucker Davis -- actively managed the KICs. Through their ownership of KHC, the Davis Family owned or had the benefit of all of the equity in the KICs. In April of 1987, however, the Davis Family suffered the loss of their KHC stock. The circumstances that ultimately resulted in this loss form the factual basis for their claims.

The Corporate Plaintiffs are essentially owned by Kenneth W. Davis, Jr. and his immediate family. The Corporate Plaintiffs, however, are, and always have been, separate from KHC, KIII, and their subsidiaries and affiliates. The Corporate Plaintiffs maintained their own banking and credit relationships and did

not participate in the borrowings made on behalf of the KICs by KIII.

The Respondents are former lenders to the KICs and several of them are former lenders to the Corporate Plaintiffs. In the amended complaint, Petitioners segregated the Respondents into four distinct groups based upon the nature and extent of their participation in the wrongdoing: the Agent Banks, the Individual Defendants, the Syndicate and the Conspirator Banks.

The Agent Banks are Morgan Guaranty Trust Company of New York ("Morgan") and Security Pacific National Bank ("Security"). Their specific agency responsibility was to assist the KICs in obtaining a restructuring of the KICs' unsecured bank debt. The individual defendants were officers of Morgan and Security, and were also the principal

representatives of the Agent Banks in their dealings with the KICs.

Most of the Respondents were members of the Syndicate, an association of banks that during 1983 and 1984 represented that they wanted to participate in a consolidated restructuring of the KICs' unsecured debt. The Syndicate created a subcommittee of major banks, including Morgan and Security Pacific, called the "Steering Committee." The Steering Committee comprised the members of the Syndicate who were most active in dealings with the KICs. Each Syndicate member, or its successor, is now a shareholder of KHC. The Conspirator Banks were lenders to, or claimed to be creditors of, the KICs as of February of 1985. All of the Conspirator Banks, or their' successors, are now shareholders of KHC.

II. Background

In reviewing a Rule 12(b)(6) motion, the facts alleged by the Petitioners are accepted as true. As this Court stated in Conley v. Gibson, 355 U.S. 41, 45-6 (1957), "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." Petitioners' amended complaint is included in the Appendix.

In early 1982, KIC management forecasted an economic downturn in the energy and energy-related industries. The downturn in fact began shortly thereafter, and some of the KICs began to suffer operating losses. These losses did not jeopardize the individual companies, much less the long term profitable viability of the KICs as a group, but as a part of the

overall response to the anticipated downturn, KIC management began to investigate various strategies for dealing with the downturn. This included investigating ways to restructure existing debt. Preliminary discussions with various lenders began and continued throughout 1982 and early 1983.

What KIC management did not know was that, at or about the same time, the Respondents had made a fundamental change in their lending philosophy as it related to companies with substantial involvement in the energy business: Simply put, the Respondent Banks had no intention of reacting to the downturn in the manner of traditional commercial bankers. Most of the Syndicate Banks had no historic connection to the energy industry and had merely speculated during the boom years of 1977 through 1981. The speculation in

energy lending had fostered no commitment to the industry, and the lenders therefore had no intention of assisting in good faith restructuring, renewals and rearrangements that were calculated to help borrowers survive. Instead, as Petitioners alleged, the strategy was to use any machination, including outright fraud, to extract all available cash, and then take the borrowers' assets or, as in this case, control of those assets.

The Respondents routinely began to use "negotiations for restructuring" as a subterfuge to extract a borrower's cash. When the cash was gone, the assets were taken and turned to cash as fast as possible. This only compounded the problems by ruining the market place with distress sales.

Good assets, especially those with a market not wholly dependent on the price

of oil and gas, were eagerly sought. If such assets could be acquired through foreclosure from borrowers with classified loans and debts that had been written off, they could be resold for a profit that went directly to the lenders' bottom line. In retrospect it is clear that the KICs, with their diversified income streams and various lines of business, were an obvious target.

The KICs, however, presented the Syndicate with unique circumstances. First, the KICs' debt to the Syndicate Banks, approximately $494,000,000.00, was unsecured. Second, the companies were fundamentally strong. This intrinsic worth made them an attractive candidate for acquisition, especially if it could be done on a distressed basis. ' Since the Syndicate was unsecured, however, it could not rely on foreclosure as a means of

wresting control of the KICs from the Davis Family. It needed an alternative solution.

The simplest route to control was to defraud KIC management into doing precisely what the Syndicate wanted done. Despite the repeated representations that were made between the spring of 1983 and January of 1984, the Syndicate never had an intention of dealing with the KICs' loans through traditional concepts of restructuring. From the outset of talks with the KICs regarding restructuring, the undisclosed goal was to put the KICs into distress and then acquire their assets. In essence, the Syndicate planned and executed a fraudulent unfriendly takeover, of which the target and its equity holders were unaware.

In January of 1983, as the Syndicate knew, however, the KICs were not

distressed. Management had numerous viable options to assure that the KICs weathered this downturn as they had others in the past: recourse to equity markets, mergers, acquisitions, consolidations, selected Chapter 11 proceedings for the most troubled of the KICs, or various combinations of these options. Since the exercise of any of those options would have frustrated the banks' acquisitive goals, the Syndicate had to convince KIC management to pursue a course of restructuring unsecured debt, an attractive option that the Syndicate in reality did not intend to consummate. In addition, the Syndicate required time to maximize the benefits to be extracted from the KICs. Their scheme essentially was to extract as much cash or assets as possible, and then to acquire the KICs and/or their remaining assets.

Ultimately, the scheme was a total success. Over an extended period, while purported negotiations were held, the KICs were crippled and more than $300,000,000.00 was lost as the result of the fraud.

The Syndicate's strategy was to a large degree implemented by machinations that were a form of "bait and switch." From approximately the middle of 1983 through December of 1984, the Syndicate, usually through the Agent Banks, would feign agreement as to basic terms for restructuring the debt and in exchange extract concessions that weakened the KICs. The Syndicate then reneged on the basic agreement, claimed to be renegotiating and started the process all over again. In their amended complaint, Petitioners alleged a number of specific instances of this "bait and switch."

In retrospect, the KICs were probably mortally wounded by one of the fraudulent bait-and-switch episodes that occurred in March of 1984. At that time, the Agent Banks represented that a restructuring was all but complete, but the KICs needed to enter into a short-term "credit override" agreement in order to put all lenders on an equal footing and to show good faith. This show of good faith, the KICs were told, would get the deal consummated. Believing the final restructuring was imminent, the KICs acquiesced. They were, however, misled. A final restructuring was not imminent, the credit override agreement was not short-term, but rather remained in effect for almost one year, and its ramifications devastated the KICs. Under the agreement, the debt service of the KICs was increased by $800,000.00 per month. More importantly, however, each of

the KICs became the guarantor of each other KIC, thus effectively foreclosing the rehabilitation or bankruptcy protection of any individual KIC or small group of KICs, and indeed foreclosing any option for rehabilitation other than under terms dictated by the Respondents.

Another specific example of fraud designed to extract all available cash occurred in September of 1984. At that time, the Syndicate represented in writing that, if approximately $50,000,000.00 in principal were paid, a final agreement would be reached. Relying on the representation, the KICs paid in excess of $50,000,000.00 against outstanding principal owed to the Syndicate Banks. After that extraction, the KICs were barely the shell of what they had been less than fifteen months before.

An integral part of the Respondents' fraudulent scheme was the simultaneous disabling of the Corporate Plaintiffs. While operated separately under distinct ownership, the Corporate Plaintiffs enjoyed a unique and advantageous relationship with the KICs by virtue of their ownership by Ken Davis, Jr. and his immediate family. The Corporate Plaintiffs provided financing for KICs' receivables and enjoyed other beneficial business arrangements with the KICs. Because of this, the Corporate Plaintiffs were a hindrance to the Respondents in the effectuation of their scheme. The Respondents therefore incorporated the debilitation of the Corporate Plaintiffs into their scheme. They succeeded by agreeing to refuse to lend them any funds, placing unusual and unnecessary restrictions on their credit arrangements,

and terminating their advantageous relationship with the KICs.

Ultimately, the Respondents dropped the pretense of negotiating a restructuring. After having extracted an enormous $7,000,000.00 in onerous interest and a payment on principal in excess of $50,000,000.00, members of the Syndicate joined in filing a petition placing KIII and KHC into involuntary bankruptcy (the "KIC Bankruptcies"). Not surprisingly, the involuntary proceeding was filed approximately 120 days after the fifty million dollar paydown, at a time when the payment had become immune from recapture by the KICs as a preferential transfer under the bankruptcy code. The filing was but one more act in a series designed by the banks to achieve their objective, to obtain control of the KICs.

After the commencement of the KIC bankruptcies, the Conspirator Defendants agreed to join the Syndicate Banks and share in the anticipated profit. This confederacy was evidenced by a written agreement, called the "Intercreditor Agreement," executed on April 1, 1986. By joining the agreement, the Conspirator Banks ratified and joined the Syndicate in the fraud.

The Syndicate's true intention was finally revealed after approximately one year of alleged continued negotiation, when the Steering Committee, acting as the creditors' committee in the KIC bankruptcies, filed the Committees Plan of reorganization for KHC and KIII. In essence, the Committee's Plan called for the stock owned by the Davis Family to be transferred to the Respondents. The KHC stock owned by the Davis Family was

canceled and the Respondents were issued new stock, consummating the complete transfer of the Davis Family's equity ownership of KHC and control of the KICs to the Respondents.

III. The Proceedings Below

In February of 1988, Petitioners filed suit in Texas state court against Respondents. At that time, ownership of KHC and control of the KICs was vested in the Respondents. The case was subsequently removed to federal court on the basis of federal question jurisdiction. Respondents then moved to dismiss the complaint for failure to state a claim and alternatively moved for summary judgment. The district court granted Petitioners leave to amend their complaint, and an amended complaint was filed. (Appendix p.67a).

The amended complaint alleged a number of claims against the Respondents including violations of RICO, securities fraud, conspiracy and intentional interference with advantageous business relations. Two distinct patterns of racketeering and conspiracies in connection with those patterns were alleged: the "Steering Committee" racketeering and the KIII Racketeering. The fraud committed in the operation of the Steering Committee in its dealings with KIC management manipulated and misled the KICs into one disastrous step after another, resulting in a loss of over $300,000,000.00 in net worth. As a proximate result of this racketeering, the value of the stock owned by the Davis Family was devalued in the amount of at least $300,000,000.00.

Security and Morgan were the agents of KIII, the KICs' management company and borrower of record. While acting as KIII's agents and purporting to act in its behalf, Security and Morgan conspired to conduct the business of KIII, an enterprise, through a pattern of racketeering activity. Morgan and Security abused their agency and operated KIII, directly and indirectly, by defrauding and misleading its management into one after another decision that benefitted the Syndicate while crippling the KICs. As a proximate result of this racketeering activity, the value of the Davis Family stock fell by at least $300,000,000.00.

After Petitioners filed the amended complaint (Appendix p. 67a), Respondents supplemented their dismissal motions and renewed their request for summary

adjudication. On August 30, 1989, the district court dismissed the federal claims solely on Rule 12(b)(6) grounds and remanded the common law claims to state court. On motion for reconsideration, the district court entered a new order in which it found that Petitioners lacked standing to pursue any of their claims. The court then dismissed all claims on Rule 12(b)(6) grounds. (Appendix p.3a).

The claims of the Davis Family were dismissed on the grounds that, as shareholders, they were only indirectly injured. The court held that, since Petitioners could not meet state law standing requirements, there was no need to analyze their claims for standing under RICO. The claims of the Corporate Plaintiffs concededly met state law standing rules, but the district court nonetheless dismissed their claims on the

grounds that they were too speculative and remote to have been caused "by reason of" the RICO violations. (Appendix p.60a).

That order was appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, agreeing with the district court's ruling on standing, affirmed in an unpublished opinion: "The [district] court concludes, in that opinion, that the plaintiffs lack standing. We agree with that conclusion. Accordingly, we affirm on the basis of the district court's able opinion...." (Appendix p.2a).

REASONS FOR ALLOWING THE WRIT

1. The United States Court of Appeals for the Fifth Circuit erred in using state common law notions of standing and direct versus indirect injury as the basis to dismiss the RICO claims of Petitioners, because RICO has its own standing requirement. The application of state law standing concepts completely frustrates the regulatory scheme envisioned in RICO, undermines its consistent interpretation and enforcement, and permits racketeers to

escape civil prosecution. Certiorari should be granted to decide if state common law or federal law determines matters of RICO standing.

The Davis Family claims were dismissed for lack of standing without any analysis of whether they had standing under RICO. Instead, the district court and the Fifth Circuit determined that the Davis Family Petitioners had no standing under state law and therefore analysis under RICO was unnecessary. This was error. RICO contains only one standing limitation and that is that the plaintiff be a person injured "by reason of" the RICO violation. The judicial engrafting of extra-statutory standing requirements cannot be sustained.

Recent decisions of this Court have unequivocally stated that RICO's interpretation is governed by its express text and legislative history, not by

implication or silence. H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989). And, as this Court held in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-97 (1985), "[T]he plaintiff only has standing...if he has been injured in his business or property by the conduct constituting the violation...**But the statute requires no more than this**."

Engrafting additional limitations on the private cause of action under RICO conflicts with this Court's pronouncements concerning judicial review of RICO claims. RICO is to be liberally construed and its remedial purposes are to be enhanced, not retarded. Sedima at 497-98. To rely solely on state law principles to dismiss a RICO claim for lack of standing without examining whether the dismissal effectuates RICO's policies and goals

retards the prosecution of RICO claims and constricts RICO's purview.

RICO standing must be viewed not in isolation but as a means to effectuate the goals of the act. The racketeering act is a compendium of legislation designed to deter and punish fraudulent interstate business activity of the type committed by the Respondents, and it includes a "far reaching civil enforcement scheme." Sedima, 473 U.S. at 483. Civil RICO plaintiffs are private attorneys general whose actions "fill prosecutorial gaps." Id. at 493. The imposition of extra-statutory standing requirements severely limits the ability to fill those gaps and curtails civil prosecution.

The disposition of this case in the courts below amply demonstrates the problem. Petitioners' claims were dismissed because the lower courts ruled

that, as former shareholders, Petitioners were only injured indirectly; the directly injured parties were the corporations (the KICs). At the time this suit was filed, however, the KICs were owned and controlled by the Respondents. They would not have sued themselves. Unlike the ordinary circumstance where the directly injured party can be expected to bring suit, denial of standing to the Petitioners ensures that the RICO claims go unprosecuted, despite the fact that no one actually controverts the injury in fact suffered by the Davis Family.

Giving such deference to the so called "direct injury rule" is unwarranted. RICO contains no condition that an injury be direct versus indirect, nor does RICO implicitly embrace a direct injury standard. In reality, the direct injury rule is nothing more than a

judicially created preference that the directly injured party should bring the suit. See Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918) (The "tendency" of the law is to give full recovery to the directly injured party.). The preference has never been, and should not be, rigidly applied, nor should it be exalted to the level of replacing RICO's "by reason of" language.

The direct injury "rule," as well as the exceptions to it, are grounded in three fundamental concepts. First, standing should be used to encourage legislatively created civil enforcement schemes. Carter v. Berger, 777 F.2d 1173, 1176 (7th Cir. 1985). Second, no person "should profit from his own inequity or take advantage of his own wrong." Cardozo, Benjamin, The Nature of the Judicial Process 41 (New Haven: Yale

University Press 1921). Stated another way, standing should not serve as a shield to insulate wrongdoers from responsibility for their acts. Gibraltar Savings v. LDBrinkman Corp. 860 F.2d 1275, 1286 (5th Cir. 1988). Finally, standing requirements should not leave indirectly injured parties without redress. See Jones v. H.F. Ahmanson & Co., 1 Cal.3d 93, 460 P.2d 464 (1969).

Several courts have borrowed the direct injury preference as historically applied in antitrust case law to effectuate RICO's broad scheme. See, e.g., Carter v. Berger, 777 F.2d 1173, 1175-77 (7th Cir. 1985) (adopting the reasoning and quoting from this Court's opinion in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The preference that the directly injured party act as the private attorney general is founded on the

policy of maximizing deterrence by assuring that suit is brought. Carter, 777 F.2d at 1176. Preference for the direct plaintiff satisfies that objective because that party, having the most at stake, is more likely to bring suit and is encouraged to do so by receiving the full recovery. Id. at 1177. In addition, since the directly injured party can recover the entire amount of the damages, the chance of inconsistent judgments or duplicative small recoveries is eliminated. Id. Generally, this approach is fair to the indirectly injured party because he or she will be compensated through sharing in the direct recovery. Adams-Lundy v. Ass'n of Professional Flight Attendants, 844 F.2d 245, 250 (5th Cir. 1988) ("The indirectly injured party should look to the recovery of the

directly injured party, not the wrongdoer, for relief.").

The rule preferring that the directly injured party act as the private attorney general must have exceptions. Its purpose is wholly undermined if standing preferences are used to assure that suit will never be prosecuted. This eventuality was addressed by the Carter court. In that case, the court denied standing to indirectly injured plaintiffs on the ground that the directly injured party was able to file, and was in fact pursuing, suit. Significantly, however, the court recognized that indirectly injured parties must be allowed judicial redress when the directly injured party is disabled. Analogizing civil RICO enforcement to federal antitrust, the court noted:

> The machinations of the wrongdoers, combined with the difficulty of inducing agents of the [directly injured party] to exact maximum effort at all times, may counsel permitting suits by indirect victims more freely in RICO cases than in the law of antitrust.
>
> The Court anticipated a similar possibility in Illinois Brick. It said that an indirect purchaser may sue "where the direct purchaser is owned or controlled by" the wrongdoer. [citations omitted] Doubtless indirectly injured parties could recover under RICO when they show that the directly injured party was under the continuing control or influence of the defendant or his henchmen.

777 F.2d. at 1178. Similarly, if the directly injured party is not going to pursue the suit, the indirectly injured party should be allowed to proceed. See, e.g., Gibraltar Savings v. LDBrinkman Corp., 860 F.2d 1275 (5th Cir. 1988) (creditor bringing alter ego claim against the bankrupt's parent held not to be the directly injured party but allowed to

proceed because the directly injured party was not going to proceed).

These are correct statements of the law. To hold otherwise and deny standing to former shareholders when the corporation is, at the time of suit, under the control of the wrongdoer and will not proceed undermines the very policy which the direct injury approach attempts to further. At one and the same time, it frustrates the clear intent of RICO and permits the wrongdoers to escape liability with impunity. The RICO claims of the Davis Family fall squarely within the exception recognized in Carter. As former shareholders of a corporation controlled by the wrongdoers at the time of suit, they are the only parties who can or will pursue the claim, carry out the legislative scheme, and exact recompense from the wrongdoers. The Davis Family

members are the only potential private attorneys general, the only persons capable of bringing suit to redress precisely the type of interstate business fraud that the banks committed. The application of state law standing principles to preclude their RICO claims completely frustrates the statute's purposes and goals.

2. The use by the United States Court of Appeals for the Fifth Circuit of "non-RICO" standing requirements conflicts with the decisions of other United States Courts of Appeals. Certiorari should therefore be granted to resolve this conflict and the potential for continuing conflict in this vital area of federal regulatory law.

The RICO claims of the Davis Family were dismissed on the sole basis that, as former shareholders in the KICs, the Davis Family members were only indirectly injured by the wrongs stated in the amended complaint, and, therefore, lacked standing. The Fifth Circuit adopted this

reasoning. The analysis conflicts with decisions in other circuit courts of appeals with respect to whether RICO plaintiffs must meet standing requirements not set forth in the statute.

In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), this Court held that a plaintiff had standing to pursue a RICO claim when the person was injured "by reason of" the RICO violation. The parameters of this standing limitation have not been precisely established and have generated considerable differences in the circuit courts of appeals. The RICO statute itself contains only the "by reason of" limitation. Nonetheless, some circuits, including the Fifth Circuit, have stated that "non-RICO" standing must be met before any analysis proceeds under RICO. There is no uniform rule, however. See In re Sunrise Securities Litigation,

916 F.2d 874, 881 n.9 (3rd Cir 1990) (collecting RICO cases reflecting that the courts disagree with respect to the source law to be reviewed in determining whether an injury is derivative; some courts look to state law, some analogize to antitrust law, and some appear to rely on federal common law).

In Ocean Energy II, Inc. v. Alexander & Alexander, Inc., 868 F.2d 740, 746 (5th Cir. 1989), the Fifth Circuit adopted a two-step analysis to determine whether a plaintiff had standing under RICO. First, if "non-RICO" standing requirements apply, the plaintiff must meet them. Thus, if, under state law, a plaintiff would not have standing to raise an analogous state law claim, there is no need to analyze if the plaintiff would have standing under RICO. Second, if the plaintiff meets the non-RICO standing requirements, or there

are no applicable non-RICO standing requirements, the analysis proceeds under RICO's standing requirement -- injury by reason of a violation.

The approach of the Fifth Circuit conflicts with that of other circuit courts which have refused to import non-RICO standing requirements. In Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461 (9th Cir. 1990), cert. granted, ___U.S.___, 111 S.Ct. 1618 (1991), for example, the Ninth Circuit refused to impose a requirement that standing under the securities laws was a prerequisite to RICO claims based upon predicate acts alleged to be securities fraud. The district court in that case had granted summary judgment against the SIPC because it was neither a purchaser nor seller of securities and therefore had no standing under the securities laws. Accordingly,

the lower court held, it could have no standing under RICO. The Ninth Circuit reversed. Since RICO contained no such limitation, no limitation should be engrafted:

> With regard to the RICO statute, however, the private civil action for violation of it was not created by the courts, but by Congress in enacting the statute. The RICO statute contains no limitation that a plaintiff must be a purchaser or seller of a security, and it is not appropriate for this court to impose such a limitation.

Id. at 1466. The Eleventh Circuit position is similar. See Warner v. Alexander Grant & Co., 828 F.2d 1528 (11th Cir. 1987) (RICO has no standing requirement analogous to the purchase or sale requirement of the federal securities laws). But see International Data Bank, Ltd. v. Zepkin, 812 F.2d 149 (4th Cir. 1987) (plaintiff who was neither a purchaser nor seller of securities did not

have standing under RICO to pursue a claim predicated on a Rule 10b-5 offense) and Brannan v. Eisenstein, 804 F.2d 1041 (8th Cir. 1986).

If standing requirements under other federal laws need not be met to pursue a RICO claim, there is no logical reason why standing requirements under state law should be accorded greater deference. Indeed, since state law is not uniform, the more logical approach would reject state law as the guideline for standing. What might be a RICO claim in California may not be in Texas, not as a function of the federal regulatory scheme but purely a matter of fortuitous circumstance.

3. The decision below raises a serious federal question concerning the extent to which RICO's "by reason of" language involves anything more than proximate cause.

The district court, and by adoption the Fifth Circuit, implicitly if not

expressly recognized that the Corporate Plaintiffs suffered foreseeable injury in fact: "The Corporate plaintiffs may have suffered injury in fact as a result of the RICO violations, just as the shareholders in fact suffered. However, the plaintiffs must demonstrate more than a foreseeable injury in fact." (Appendix p.59a). The court nonetheless concluded that the injury is too attenuated and speculative. This was error.

The language of RICO is clear. Section 1964(c) provides that "[a]ny person injured in his business of property by reason of a violation of 1962" may sue. The definition of "person" is broadly defined to include "any person." 18 U.S.C. §1961(3). The express text of the statute, therefore, does not contain any additional standing limitations. As this Court stated in Sedima, "[T]he plaintiff

only has standing if...he has been injured in his business or property by the conduct constituting the violation...But the statute requires no more than this." Id., 473 U.S. at 496-97.

The only somewhat illuminating statement made by the district court was conclusory: "[T]he injury the Corporate plaintiffs may have suffered is too attenuated and speculative to have been caused 'by reason of' the predicate acts." (Appendix 60a). The manner in which the district court and the Fifth Circuit arrived at this conclusion, however, neglects both procedural and substantive law. Indeed, under Conley v. Gibson, the effect of the lower courts' ruling is that they found beyond any doubt that there was no set of provable facts under which proximate cause could be shown.

Under a Rule 12(b)(6) analysis, the allegations of the Corporate Plaintiffs are presumed true. The Corporate Plaintiffs alleged several claims against the Respondents including both substantive and conspiracy RICO violations, conspiracy, and intentional interference with advantageous business relations. The amended complaint detailed the lucrative relationship between the KICs and the Corporate Plaintiffs, and as well specifically alleged that Respondents had used the Corporate Plaintiffs as a means and an end, a tool and a target, to accomplish the primary objective of their scheme -- the acquisition of the KICs. The attack on the Corporate Plaintiffs was part and parcel of the entire scheme; by tightening the financial noose around the necks of the Corporate Plaintiffs, by interfering with their ability to get

credit, and by interfering with their contracts, the Respondents could more easily coerce the capitulation of the KICs. As the result of the conduct of the Respondents, as Petitioners alleged, the Corporate Plaintiffs suffered directly. Not only were their financial lifelines severed, but the profitable relationship with the KICs was completely destroyed.

The allegations of the Corporate Plaintiffs cannot be gainsaid. Both the district court and Fifth Circuit acknowledged the foreseeable injury. But they also have apparently imposed an additional requirement which is nowhere found in RICO. Proximate cause entails only two elements: injury in fact and foreseeability. Those two elements are expressly stated in the judgment, yet the Corporate Plaintiffs were still denied standing to pursue their RICO claims.

The decision by the court below simply cannot be reconciled either with the language of RICO or with decisions in the Fifth Circuit and other circuits as well, which have found similar allegations sufficient to state cognizable RICO injury. See, e.g., R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1354 (5th Cir. 1985) (allegations of business disruption and expense caused by scheme to defraud); Howell Petroleum Corp. v. Weaver, 776 F.2d 1302 (5th Cir. 1985) (Allegation of loss of funds as result of fraudulent scheme satisfies the injury requirement); Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1983) (RICO injury present where insolvent insurance company was victim of the operation of its corporate parent through conduct which prolonged the insurance company's life beyond insolvency and exacerbated its financial woes). See also

Ferlerger v. First American Mortgage Co., 662 F.Supp. 584, 589 (N.D. Ill. 1987) (Allegation of loss of application fee and opportunity to obtain mortgage on better terms states cognizable RICO injury) and Chinnici v. Central Dupage Hospital Ass'n, 1990 U.S.Dist. LEXIS 8164 (N.D. Ill. 1990) (Allegations of conspiracy aimed in part at terminating plaintiff's business relationship with another person stated RICO injury).

The parameters of the "by reason of" limitation have not been settled, and this Court should therefore grant certiorari to address and to resolve this issue. This Court has stated only that the "strict requirements [of] standing to sue and 'proximate cause'" which pertain to antitrust cases do not apply in RICO cases. Sedima 473 U.S. at 498. This has been interpreted by the Fourth Circuit as

meaning that the standard is simply one of traditional proximate cause analysis. Brandenburg v. Seidel, 859 F.2d 1179, 1189 n.11 (4th Cir. 1988). The Fifth Circuit, however, as evidenced by its decision in this case, apparently holds that more than proximate cause is required to be shown.

Conclusion

For the foregoing reasons, this Court should issue a Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Certificate of Service

I, Eugene B. Wilshire, Jr., a member of the Bar of this Court hereby certify that a true and correct copy of the Petition for Writ of Certiorari and Appendix thereto has been served on American Bank & Trust Company of New Orleans, The Trust Company of New Orleans, The Bank of New York, Bank of Oklahoma, N.A., Credit Commercial De France, First Interstate Bank of California, First RepublicBank of California, First RepublicBank Fort Worth, Irving Trust Company, MBank Dallas, MBank Fort Worth, MBank Houston, Morgan Guaranty Trust Company of New York, Seattle-First National Bank, and Security Pacific National Bank, Bank of Nova Scotia, The Chase Manhattan Bank, N.A., First City National Bank of Fort Worth, First City National Bank of Houston, Sanwa Bank California (Successor to Lloyds Bank of California) by and through their respective attorneys-in-charge, by certified mail, return receipt requested on this the 8th day of July, 1991. I further certify that all parties required to be served have been served.

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